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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of December 16, 1963, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case as prayed for in the petition filed October 10, 1963, herein.

Petitioner maintains that the Court of Claims erred in holding that the "Termination for Convenience" clause specified in the Armed Services Procurement Regulation restricted the amount of damages which the petitioner and its subcontractors could recover for the Government's termination of a contract. The contract did not contain a "Termination for Convenience" clause and had been approved by the Secretary of Defense's designee pursuant to a statute which specifically authorized him to prepare such a contract form.

QUESTION PRESENTED

Did the petitioner's contract include, as a matter of law, a "Termination for Convenience" clause as set forth in section 8-703 of the Armed Services Procurement Regulation, even though the parties deliberately omitted such clause from the contract form and that form had been approved by the Secretary of Defense as provided by statute?

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Conflict of Decisions Has Recently Developed

At the time of filing its petition herein, petitioner failed to point out that, notwithstanding the great impact that the erroneous decision below would have on this country's multibillion dollar national defense procurement program, litigation in the circuit courts with a resulting conflict of decisions was improbable because of the concentration of Government contract actions in the Court of Claims. Contract claims against the Government in excess of $10,000 must be asserted in the Court of Claims. 28 U.S.C. 1346(a)(2). Because of the amounts usually involved in Government contract cases, almost all contract actions against the Government are filed in the Court of Claims.

This situation is very similar to the third example of when this Court might grant a Motion for Rehearing set forth in this Court's Rule 58(b). *Schgiber-Shroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938), cited in that rule, is an example of a valid reason for granting a rehearing. After a denial of a petition for a writ of certiorari, the petitioner's request for rehearing was granted upon a showing that such patent litigation was so concentrated in a single

circuit that there was no possibility of securing the conflict of decisions usually necessary for a review by this Court. Since Government contract actions are, for the reasons explained above, so heavily concentrated in the Court of Claims, a showing of conflict of decisions is almost impossible. In recent decades such a conflict in substantive Government contract law has seldom developed. Yet, Government contracts are now one of the most vital factors in our national economic life.

Furthermore, the Court of Claims is, in light of the very few Government contract cases reviewed by this Court, the court of first and last resort available to most Government contractors; its decisions are not reviewed by a circuit court of appeals. This unusual feature was just recently highlighted by Mr. Frederick Bernays Wiener in the December 1963 issue of the *American Bar Association Journal* (49 A.B.A.J. 1172):

> Nowadays in all but very exceptional cases the Court of Claims is both a court of first instance as well as a tribunal of last resort. This is not an entirely healthy situation . . . .

This Court has, therefore, a heavier responsibility to review Court of Claims decisions on government contract matters than cases which have originated in federal district courts and have received the substantial benefit of a review by a circuit court of appeals.

The need for this Court to review decisions of the Court of Claims is evident from the fact that during the past 20 years this Court has not by majority decision affirmed a single Court of Claims case involving a Government contract issue. On the other hand it has reversed the Court of Claims in the following seventeen

Government contract cases: *United States* v. *Bianchi*, 373 U.S. 709 (1963); *Mississippi Valley Generating Co.* v. *United States*, 364 U.S. 520 (1961); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Binghamton Constr. Co.*, 347 U.S. 171 (1954); *Central Bank* v. *United States*, 345 U.S. 639 (1953); *Wunderlich* v. *United States*, 342 U.S. 98 (1951); *United States* v. *Moorman*, 338 U.S. 457 (1950); *United States* v. *Penn Foundry & Mfg Co.*, 337 U.S. 198 (1949); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); *Priebe & Sons* v. *United States*, 332 U.S. 407 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946); *United States* v. *Joseph A. Holpuch Co.*, 328 U.S. 234 (1946); *United States* v. *Beuttas*, 324 U.S. 768 (1945); *United States* v. *Blair*, 321 U.S. 730 (1944); *Brooks-Callaway Co.* v. *United States*, 318 U.S. 120 (1943); *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56 (1942); *United States* v. *Rice*, 317 U.S. 61 (1942).

These seventeen reversals account for all but two of the Government contract cases coming from the Court of Claims which have been reviewed by this Court since 1942. In the only other two cases so reviewed, this Court affirmed the Court of Claims decision by an equally divided Court. *Bell Aircraft Corp.* v. *United States*, 344 U.S. 860 (1952); *Penner Installation Corp.* v. *United States*, 340 U.S. 898 (1950).

In addition, the need for review by this Court in this case is especially dramatized by the Court of Claims' very recent decisions discussed below. These new Court of Claims decisions were rendered almost simultaneously with this Court's denial of the petitioner's petition for a writ of certiorari.

The basic issue in this case is the nature of the damages that can be recovered by a contractor whose contract is cancelled by the Government. On December 13, 1963, just three days before the petition for certiorari was denied in this case, the Court of Claims issued three decisions involving the nature of damages to be paid by the Government for cancellation of contracts. Those decisions are inconsistent and contrary to prior rulings of that court.

The three cases decided by the Court of Claims on that day which have created absolute chaos in the area of the damages that might be obtained from the Government for termination of contract are *Goldwasser* v. *United States*, Ct. Cl. No. 477-61; *Brown & Son Electric Co.* v. *United States*, Ct. Cl. No. 76-61; and *John Reiner & Co.* v. *United States*, Ct. Cl. No. 431-57.

As one writer has stated, the true explanation for the differing final conclusions in these cases is simply that they were written by judges who hold opposite views. 5 *Government Contractor*, paragraph 582 (1963).

In the *Goldwasser* case, Judge Samuel E. Whitaker writing for the majority stated that where the Government did not in fact terminate a contract under the "Termination for Convenience" clause, its wrongful cancellation of the contract could not later be deemed a convenience termination but must be treated as a contract breach for which the Government must pay common law damages, including anticipatory profits. To this Judge Oscar Davis (who wrote the decision below in this case) and Chief Judge Marvin Jones dissented.

In the *Reiner* case, Judge Davis wrote for the majority and held that the "Termination for Conven-

ience", clause *does* apply to an erroneous contract termination even though the Government never in fact terminated the contract under such a clause. To that, Judge Whitaker dissented. In the *Reiner* decision Judge Davis repeated his ruling in this case below (*G. L. Christian & Associates*) to the effect that the Armed Services Procurement Regulation has the force of law. However, in the *Reiner* case he also stated for the Court of Claims that the Government was not required to adhere to the ASPR termination procedures unless the contractor can show that he was injured by such lack of adherence. If ASPR has the force of law, both parties must be required to follow them. Judge Davis appears to be drawing away from the rigidity of the rule he announced in the instant case.

Most shocking to contractors is Judge Davis' statement in the *Reiner* case that no contractor will be able to satisfy the requirement established by this Court in *United States* v. *Penn Foundry & Mfg. Co., supra,* that he prove by clear and direct proof that he would have earned anticipatory profit. Judge Davis says in *Reiner* that no contractor will be able to carry that burden because he will not be able to show that his contract would have been allowed to continue to completion. Judge Davis based that conclusion on the assumption that a contracting officer will cancel the contract under the "Termination for Convenience" clause "as soon as someone he deemed authoritative had whispered in his ear that he was breaching the agreement by cancelling it in the way he did." What novel legal reasoning! The rights of a contractor to damages for the improper termination of a Government contract are not to be reversed merely because later someone might "whisper" into a contracting offi-

cer's ear. Is it proper or legal that contractors' rights under an annual multibillion dollar Government procurement program are to be affected by *ex post facto* whisperings?

In the *Brown* case as in the *Reiner* case, Judge Davis again writing for the majority applied the measure of damages set forth in the "Termination for Convenience" clause, even though the contract had not been terminated pursuant to that clause; Judge Whitaker dissented thereto.

A reading of these three decisions shows that the various judges of the Court of Claims differ in their conclusions in those cases primarily because they disagree as to what application should be given to the court's holding in *Klein* v. *United States*, 152 Ct. Cl. 8, 285 F.2d 778 (1961). That decision was written by Judge J. Warren Madden whose place, when he retired from the Court of Claims in 1962, was taken by Judge Davis. In his *Reiner* decision, Judge Davis admitted that he was overruling, at least in part, the *Klein* case. (This petitioner, in the case below, had asked the Court of Claims to follow its decision in the *Klein* case.) On the other hand, Judge Whitaker in writing for the majority in the *Goldwasser* case and in his dissent in the *Reiner* case accepts the Court of Claims' previous holding in *Klein* in its entirety.

Judges Whitaker and Davis differ over the effect to be given to the *Klein* case because of the Court of Claims' construction and application in the *Klein* case of this Court's ruling in *College Point Boat Corp.* v. *United States*, 267 U.S. 12 (1925). The Court of Claims pointed out in the *Klein* case that in the *College Point* case the Government was given the right by a 1917 statute to terminate the contract for its conven-

ience but that under the facts in the *Klein* case the Government did not have any such statutory right to terminate a military contract. It added that the Government's right to terminate for default or convenience was as specified in the express terms of that military contract. That is exactly the position of petitioner in this case—no statute gave the Government the right to terminate for convenience petitioner's contract, and the Government's right to terminate was therefore governed by the terms of the contract. The same relevant statutes were applicable to the facts in the *Klein* case as are applicable to the facts in the instant case.

The Court of Claims' decision in the *Goldwasser* case, written by Judge Whitaker, adopted the *Klein* ruling which agrees with petitioner's basic position in this case. On the other hand, in the *Brown* and *Reiner* cases, Judge Davis writing for the majority refused to follow *Klein*. Judge Whitaker dissented in those cases because he was of the opinion that the *Klein* case should control. In his decision below in this case, Judge Davis relied heavily upon the *College Point* decision for his conclusion that the terms of petitioner's contract were not controlling as to the rights of the Government to terminate the contract. As pointed out above, in the *Klein* case the Court of Claims already had held that the *College Point* case did not have such significance. Nevertheless, Judge Davis made no mention of the *Klein* case in his two decisions below in the instant case, even though it was urged as controlling in petitioner's Brief in Support of its Motion for Rehearing and Reargument. (Plaintiff's Brief in Support of Motion for Rehearing and Reargument, pp. 39-42).

In conclusion, it is stressed that since December 13, 1963, there is now a sharp conflict of decisions in the court in which almost all Government contract actions are filed with regard to the basic issue involved in this action, namely, the nature of the damages to which a contractor is entitled for the termination of his contract by the Government. Since the decision of the Court of Claims is not subject to any judicial review except by this Court, it is respectfully urged that this Court resolve the conflict over such a vital issue.

2. Government's Recent Policy of Economy and Military Cutbacks Require Certainty of Rights With Regard to Government Contract Terminations

In December, 1963, the Government cancelled contracts in excess of one billion dollars. The 800 million dollar Dyna-Soar space project was terminated, the Apollo moon-shot program was cut back, many military installations were ordered closed, and threats of other cutbacks to come were rumored. A reappraisal of the military and space programs, in light of the present international picture, has brought the executive branch of the Government to the realization that this country might eventually be returning to a peacetime economy. Cancellation of contracts is harrowing and difficult under the best circumstances; it becomes treacherous and horrifying when rights are subject to chaotic legal uncertainties such as are shown by the three Court of Claims decisions issued on December 13, 1963. It is vital to this country's economy that such uncertainty be removed by a thorough review by this Court of the substantive problem of the nature of a contractor's recovery for the termination by the Government of his contract.

3. A Contract Approved by the Secretary of Defense Pursuant to Specific Statutory Authority Is Not Valid If Contrary to Departmental Regulations

Certainly, the above statement is not the law, but it will be if the decision below is allowed to stand. It is most unusual to contend that the head of a department who is the only one authorized to issue the regulations cannot approve deviations from them. Good administrative practice requires that he have such a right.

In its petition for a writ of certiorari, petitioner failed to contend that the approval by the Secretary of Defense through his designee, the Assistant Secretary of Defense (Properties and Installations), of the housing contract form, constituted a deviation under ASPR, 1-109 from the requirements of the Armed Services Procurement Regulation. Therefore, since the contract did not contain a "Termination for Convenience" clause, the petitioner is entitled to common law damages for the Government's cancellation of its contract.

4. Concern Over the Decision Below Continues to Mount

As pointed out in the petitioner's Petition for a Writ of Certiorari and its Reply Brief, many legal writers have commented on the decision below. Most of those reviews have been critical and predicted adverse results. Such comments may be found in:

1. Commerce Clearing House, *Government Contracts Reporter*, paragraph 80,075 (1963);
2. 51 *Georgetown Law Journal* 842 (1963);
3. 32 *George Washington Law Review* 111 (1963);
4. *OGC Newsletter*, Office of the General Counsel, Department of the Navy, Vol. 9, No. 1, February, 1963;
5. 10 *Federal Bar News* 333 (1963).

More recently in 4 McBride and Wachtel, *Government Contracts*, section 30.40 (Matthew Bender & Co., 1963), it is stated after pointing out that the decision below is supported by the *College Point* case:

> The Armed Services Procurement Act contains no language expressly making mandatory the inclusion of a termination clause in contracts let by the Department of Defense. While it is not contended that the ASPR section making mandatory the inclusion of a termination clause is invalid, it is contended that the statute does not require such a clause. It also should be noted that the contract here in issue had had the approval of higher authorities in the contracting agency, the Department of the Army. Those authorities, by the terms of the Armed Services Procurement Regulation, ASPR 1-109 (March 1, 1963) are permitted to deviate from the mandatory language of that regulation. Consequently, it is the view of the authors that the decision cannot be supported.

Professor Arthur John Keeffe in his regular column devoted to the problems of practicing lawyers in the December, 1963, issue of the *American Bar Association Journal* (49 A.B.A.J. 1225, 1226) poses dramatically the questions presented by the decision below:

> Oscar Davis may by this decision revolutionize Government contracting. Why have any contract at all? Shall we just write a contractor and say we give you the job pursuant to all the appropriate regulations and in accordance with the way the Government does business? What happens to the disputes clause? Is that required even when omitted?
>
> Judge Davis merits the Procurement Oscar of 1963.

These questions and many more raised, but unanswered by the decision below, make it imperative that

the Court of Claims decision be reviewed. The only available resort is review by this Court. Furthermore, the effect of such a review is not limited to the instant case. Another case, identical in issue, is now pending before the Court of Claims. *J. W. Bateson Co. v. United States*, No. 365-60, Ct. Cl. July 12, 1963 (remanded for proceedings to determine the amount of damages).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Claims.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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